

LOUIS EDWIN LOPEZ : CIVIL ACTION
:
v. :
:
DONALD T. VAUGHN, et al. : NO. 98-6391

As the procedural and factual history underlying this petition is not in dispute, this Court adopts the following description taken from the Report and Recommendation. On January 22, 1997, a jury sitting before the Honorable James P. Cullen, Court of Common Pleas of Lancaster County, convicted Louis Edwin Lopez of one count of simple assault. On February 21, 1997, Lopez

was sentenced to nine to twenty-three months imprisonment. Lopez did not file a direct appeal.

On December 12, 1997, Lopez filed a pro se petition for collateral relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 et seq. Appointed counsel filed an amended petition presenting a host of claims of ineffective assistance of trial counsel. An evidentiary hearing was held on September 22, 1998, at which Lopez was represented by appointed counsel. Lopez's PCRA petition was denied on December 2, 1998.

On December 10, 1998, Lopez filed the instant habeas petition. On December 31, 1998, Lopez filed a notice of appeal in the Pennsylvania Superior Court. The docket reflects that Lopez's appeal to the Pennsylvania Superior Court received a docket number on February 11, 1999, and that a transcript from Lopez's PCRA hearing was sent to that court on February 23, 1999. Lopez's sentence under the instant conviction ended on January 21, 1999.

On March 12, 1999, United States Magistrate Judge Peter B. Scuderi filed his Report and Recommendation denying Lopez's petition for a writ of habeas corpus and finding that the Petitioner failed to exhaust his state remedies. Judge Scuderi recommended that this petition be dismissed pending exhaustion of state remedies. On March 25, 1999, the Petitioner filed a brief with objections to the Magistrate's Report and Recommendation.

II. JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 2254.

The statute provides, in pertinent part:

[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a). The Court reviews the magistrate judge's report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(C).

The statute provides, in pertinent part:

[The court] shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made [and] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.

28 U.S.C. § 636(b)(1)(C).

II. DISCUSSION

B. Report and Recommendation

Judge Scuderi stated that "Lopez is currently appealing the denial of his PCRA petition to the Pennsylvania Superior Court." (Report and Recommendation ("RR") at 5.) Consequently, Judge Scuderi found that:

Accordingly, judicial comity compels dismissal of this habeas petition pending exhaustion of state remedies. See Duckworth v. Serrano, 454 U.S. 1 (1981) (no circumvention of exhaustion requirement is permitted unless there is no opportunity for redress in the state courts); see also Lambert v. Blackwell, 134 F.3d 506, 517 (3d Cir. 1997) (citations omitted) ("unless a state court decision exists indicating that a habeas petitioner is clearly

precluded from state court relief, the federal habeas claim[s] should be dismissed for nonexhaustion").

(Id.)

C. Petitioner's Objections

In his brief, the Petitioner contends that he has "exhausted and attempted to exhaust his State Court remedies." (Pet'r's Br. at 1.) Thus, the Petitioner requests that this Court consider his petition. (Id. at 4.)

D. Exhaustion

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--(A) the person has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1). A petitioner has not exhausted his available state remedies as long as "he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). The court is required to dismiss a habeas petition containing an un-exhausted claim, see Rose v. Lundy, 455 U.S. 509, 522, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), and the burden rests with the petitioner to establish exhaustion of all available state remedies. See Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993); Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982).

The constitutional claim must have been fairly presented to the state's highest court for review. See Evans v. Court of

Common Pleas, 959 F.2d 1227, 1231 (3d Cir.1992), cert. denied, 506 U.S. 1089, 113 S.Ct. 1071, 122 L.Ed.2d 498 (1993); Swanger v. Zimmerman, 750 F.2d 291, 295-96 (3d Cir. 1984); Belle v. Stepanik, No. 95-2547, 1996 WL 663872, at *4 (E.D.Pa. Nov.14, 1996). The state supreme court need not have addressed the claim on the merits, as long as it was given the opportunity to do so. See Mayberry v. Petsock, 821 F.2d 179, 184 n. 2 (3d Cir.), cert. denied, 484 U.S. 946, 108 S.Ct. 336, 98 L.Ed.2d 362 (1987); Chaussard v. Fulcomer, 816 F.2d 925, 928 (3d Cir.), cert. denied, 484 U.S. 845, 108 S.Ct. 139, 98 L.Ed.2d 96 (1987).

The requirement of complete exhaustion of all state remedies, while not a jurisdictional requirement for a federal habeas petition, serves important federalism and comity principles by allowing the state courts "a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary." Toulson, 987 F.2d at 986; see Rose, 455 U.S. at 518.

In the present matter, the Petitioner concedes that his appeal of the denial of his PCRA petition is currently pending before the Pennsylvania Superior Court. (Pet'r's Br. at 3.) Thus, Lopez has clearly not exhausted his state remedies. Nonetheless, he argues that the Pennsylvania Superior Court no longer has jurisdiction over his appeal because "Petitioner's maximum term expired." (Id.) Lopez asserts that "the Pennsylvania Superior

Court should automatically recognize the maximum term expiration and dismiss Petitioner's appeal as moot." (Id. at 4.)

The Court can only excuse Lopez's failure to exhaust available state remedies if "there is an absence of available State corrective process," or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B). The proper inquiry is whether requiring exhaustion in state court would be "futile." See Lambert v. Blackwell, 134 F.3d 506, 516 (3d Cir. 1998); Christy v. Horn, 115 F.3d 201, 207 (3d Cir. 1997). The court must be able to "say with certainty" that Lopez would not be able to obtain further state review of his claim in state court. See Lambert, 134 F.3d at 516; Hammock v. Vaughn, No. 96-3463, 1998 WL 163194 (E.D.Pa. Apr.7, 1998).

The Court should dismiss a federal habeas petition whenever there is a possibility of state court review of a non-exhausted claim, "even if it is not likely that the state court will consider petitioner's claim on the merits." Banks v. Horn, 126 F.3d 206, 211 (3d Cir. 1997) (even though unclear whether the Supreme Court would reach the merits of claims in a capital case after statutory amendments, dismissal proper); see Doctor v. Walters, 96 F.3d 675, 683 (3d Cir. 1996) (even though state court review of claim statutorily barred, dismissal proper because state court might opt to reach merits anyhow).

The Pennsylvania habeas corpus statute provides: "Any judge of a court of record may issue the writ of habeas corpus to inquire into the cause of detention of any person or for any other lawful purpose." 42 Pa.Cons.Stat.Ann. § 6502(a). State habeas corpus review is available for anyone "restrained of his liberty" other than "by virtue of sentence after conviction for a criminal offense." 42 Pa.Cons.Stat.Ann. § 6503. Because Lopez's appeal of his PCRA petition is currently pending before the Pennsylvania Superior Court, he has not fully exhausted his available state remedies and this court cannot yet entertain his petition for federal habeas corpus. Lopez has a potential collateral remedy available in state court; the court cannot be certain that remedy would be "futile." See Lambert, 134 F.3d at 516-18 (uncertainty whether state courts would excuse petitioner's waiver of state remedies due to miscarriage of justice compelled dismissal of federal habeas petition for lack of exhaustion).

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LOUIS EDWIN LOPEZ	:	CIVIL ACTION
	:	
v.	:	
	:	
DONALD T. VAUGHN, et al.	:	NO. 98-6391

O R D E R

AND NOW, this 27th day of July, 1999, upon consideration of the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi (Docket No. 12) and the Brief in Support of Objection to the Magistrate's Report and Recommendation by pro se Petitioner, Louis Edwin Lopez (Docket No. 13), IT IS HEREBY ORDERED that:

(1) the Report and Recommendation is **APPROVED and ADOPTED**;

(2) the Petition for a Writ of Habeas Corpus is **DENIED and DISMISSED** pursuant to 28 U.S.C. § 2254; and

(3) there is **NO BASIS** for the issuance of a certificate of appealability.

BY THE COURT:

HERBERT J. HUTTON, J.